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Katherine A. Staton

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PROFESSIONALISM AND CIVILITY IN THE PRACTICE OF AVIATION LAW — THE VORS¹ AND GPSS² WHICH GUIDE OUR PRACTICE

KATHERINE A. STATON*

HAVE YOU EVER received discovery responses, such as the responses set forth below, in the course of litigating an aviation case?

1. State your full name, date of birth, age, current address, present name and address of employer, social security number, and driver's license designation and number.

ANSWER:

Plaintiff objects to Interrogatory No. 1 for the reason that it seeks information that does not appear reasonably calculated to lead to the discovery of admissible evidence and seeks to invade the Plaintiff's right protected by the Constitution of the State of Texas and the Constitution of the United States of America.

2. Please describe in detail the nature of the damages you allege you incurred as a result of the allegations made in the Plaintiffs' Original Petition, including the total amount of damages you are claiming, the amount claimed for each element of damage, and explain the manner of calculating such damages.

ANSWER:

Plaintiff objects to Interrogatory No. 2 for the reason that it seeks information that does not appear reasonably calculated to lead to the discovery of admissible evidence. Also, same seeks to in-

¹ AVOR@ is a ground-based Very High Frequency omnirange radio beacon that transmits frequencies in a 360 degree radius from the VOR station like spokes in the center of a bicycle wheel. *See* UNITED STATES DEP'T OF TRANSP., AERONAUTICAL INFORMATION MANUAL (AIM), PCG V-3 (1994), Flight Training Handbook 174 (1980). Pilots use VORS for navigation purposes.

² A GPS (Global Positioning System) is a space-based navigation system. *See id.* at PCG G-1.

* Katherine A. Staton practices with the law firm of Jackson Walker L.L.P., in Dallas, Texas. Ms. Staton's practice concentrates on aviation litigation and has included involvement in many of the major air disasters not only in the United States, but also in South and Central America.

vade the attorney-work product privilege protected by Rule 166b(3)(a) of the Texas Rules of Civil Procedure; the attorney-client privilege protected by Rule 166b(3)(a) and 3(e) of the Texas Rules of Civil Procedure and Evidence Rule 503 of the Texas Rules of Civil Evidence and the Plaintiff's party communication privilege protected by Rule 166b(3)(d) of the Texas Rules of Civil Procedure. Further, same is overly broad, burdensome and harassing and/or involves unnecessary expense to comply therewith.

3. Describe in detail the personal injuries allegedly sustained by you as a result of the incident made the basis of this lawsuit, identifying each part of your body that you claim sustained injury.

ANSWER:

Plaintiff objects to Interrogatory No. 3 for the reason that same is overly broad, burdensome and harassing and/or involves unnecessary expense to comply therewith and calls for Plaintiff to give an expert medical opinion for which he/she is not qualified and would require Plaintiff to respond and would be unfair and prejudicial to Plaintiff at the time of trial.³

These types of responses generate motions to compel, which translate into unnecessary expenditures of counsel time and client expense and is a waste of judicial resources needed to resolve the discovery dispute. This unnecessary discovery dispute also requires much effort on behalf of a party to obtain answers that should have been tendered under any state or federal rule, as this information is discoverable, highly relevant, and elementary in litigating an aviation case.

One has to ask him or herself "would I have submitted these types of objections, instead of fully answering properly posed discovery requests, to a judge in the pending case?" Resoundingly, most of us would have to say "No." Unfortunately, we run across responses, as listed above, more frequently than not in our aviation practice.

When I started practicing law in 1990, what I thought was normal litigation was not viewed as such by seasoned practitioners in the aviation field. I would routinely encounter counsel who would not return phone calls, would not enter into stipulations as to uncontested facts, would engage in conduct during a deposition that would be inappropriate in front of a judge, would respond to document requests in a manner so as to avoid the disclosures of relevant and non-privileged information (as cited

³ The identity of the parties and counsel are not disclosed, for obvious reasons.

above), and would cancel a deposition only upon knowing that I had boarded my flight and was en route to the destination. Granted, I learned a few tricks of the trade to prevent this kind of ambush.⁴

There was, however, another era in the aviation practice where one's word was as good as gold, where discovery schedules, extensions, and stipulations were made on a handshake or upon confirmation in a phone call, and where harassing litigation tactics and failures to return simple phone calls were nonexistent.⁵ Twenty-five years ago the aviation bar was a close bar where everyone knew each other, and civility and professionalism were the norm in most instances. Deposition notices were utilized for record purposes only, and the date, time, and place of the deposition were orally agreed to by all parties.⁶ Everyone arrived at the deposition knowing it would not be canceled, barring an unforeseen event. Interrogatories and requests for production were not used as a means for punishing your opponent by asking irrelevant or outrageous requests that had no bearing on the litigation at hand. Motions to compel were not needed because if you asked for a document or a series of documents, you knew those documents would be given to you without having to read between the lines of lengthy, convoluted and unnecessary objections. Agreements amongst counsel were not memorialized in writing, signed by each counsel, and filed with the court because you knew your opponent's word was good.

If there was a misunderstanding at hand as to an oral agreement, you called opposing counsel and worked it out, without the need for court involvement. You could also have discussions with opposing counsel off-the-record and know that these discussions would not be thrown back in your face in a court pleading or court proceeding. Today, off-the-record discussions are held only at your own risk.

If anyone in the aviation field exhibited such uncivil or unprofessional conduct towards another member of the bar, whether that member was on the same side or the opposite side of the bar, short of tar-and-feathering that individual the aviation bar would reprimand that individual accordingly. Civility and professionalism were an unspoken code of conduct within the avia-

⁴ Cross-noticing depositions, confirming *all* agreements in writing, and papering the file to document opposing counsel's uncivil and harassing conduct were some of the tools quickly learned to avoid such ambushes.

⁵ Charles F. Krause, Of Counsel, Speiser Krause.

⁶ *See id.*

tion field and acted as a mechanism that allowed the system to operate efficiently. All of this began to change for the worst in the mid-eighties.⁷

What happened to this bygone era where civility and professionalism were a way of life? Although the aviation practice is still a fairly small community, many aviation practitioners work and litigate in cities across the United States. These lawyers practice in courtrooms across the country, and their reputations precede their entry into these courthouses due to the close knit nature of our community. It is this author's opinion that our reputations and our word are the most important things in our career. If you have a reputation as an uncivil, unprofessional practitioner whose word cannot be trusted, your clients suffer, your opponents suffer, and the system breaks down. This leads to more litigation, more costs, and more delay.

This article will discuss present-day civility and professionalism in the aviation practice. It is not intended to be an exhaustive dissertation as to ethical rules, codes, or creeds but is intended to provoke thought as to encouraging civility and professionalism in our practice.

I. CIVILITY AND PROFESSIONALISM - WHAT DO THEY MEAN TO OUR PRACTICE?

Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; . . . to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.⁸

Whether you are litigating aviation tort cases, practicing transactional work, working for the government in one capacity or another, acting as in-house counsel, or defending aircraft owners or operators in contractual or commercial aspects, over the years, the names and reputations of the attorneys in our field become familiar. Some names are more familiar than others, especially when that name is tied to a reputation associated with uncivil or unprofessional conduct.

It is difficult to define what incivility or unprofessionalism constitutes in our practice. The Webster's dictionary defines "ci-

⁷ See *id.*

⁸ MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 9-6 (1976).

vility" as "a polite act or expression."⁹ Professionalism is defined as someone engaged in a learned or marked profession.¹⁰ The American Bar Association, in its 1986 Blueprint for the Rekindling of Lawyer Professionalism, noted that "professionalism" is difficult to define, which might be purposeful.¹¹ One definition of "professionalism" relates to "pursuing a learned art as a common calling in the spirit of public service"¹² Defining "professionalism" in concrete terms runs the risk of narrowing its rich history and confining its meaning.¹³

But what does civility and professionalism really mean to us as aviation practitioners? As Justice Stewart declined to define the kinds of material to be included in the definition of pornography in his concurring opinion in *Jacobellis v. Ohio Supreme Court*, his famous "I-know-it-when-I-see-it" quote might be the best way to pinpoint uncivil and unprofessional conduct in our practice.¹⁴ Uncivil and unprofessional conduct in the legal profession differs from individual to individual, from situation to situation, and deals in part with the failure to extend common courtesies and etiquette to opposing counsel, co-counsel, clients, and the court. It also includes the failure to exhibit the most basic of courtesies to a shared community, such as our aviation community, which is worthy of such courtesies.¹⁵

For example, the following exchange during a deposition would be judged by most practitioners as not passing the civility and professionalism "I-know-it-when-I-see-it" test:

COUNSEL 1: In a morning telephone conversation I asked her then if she could go ahead and reset the depositions because we wanted to take them both on the same day. She said she would get back to me.

She had not gotten back to me by yesterday afternoon, at which time I called her again and tried to cordially reschedule both depositions on the same date. She told me she would call me and she didn't.

⁹ MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 210 (10th ed. 1992).

¹⁰ See *id.* at 930.

¹¹ See AMERICAN BAR ASSOCIATION, " . . . IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM, 10 (1986) [hereinafter BLUEPRINT].

¹² *Id.*

¹³ See *id.*

¹⁴ See Rob Atkinson, *A Dissenter's Commentary On The Professionalism Crusade*, 74 TEX. L. REV. 259, 282 (1995) (citing *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

¹⁵ See Atkinson, *supra* note 14, at 294-95.

This morning I was told that we had to have a certificate of conference when I tried to work with opposing counsel in a cordial and friendly fashion.

We will be filing a Motion for Sanctions on this afternoon's deposition for Mr. *.

When Ms. * says in her letter of January 20th excuse me, July 20th that the deposition of Mr. * was noticed without agreement and without reasonable notice that is a lie to this court and opposing counsel.

And as officers of the court, I take offense to it, and I would refer Ms. * to her own employee *. Thank you. That's all I have.

COUNSEL 2: And I'd like to add that I certainly disagree with most of the statements you have made today, Mr. *, and they'd probably be better saved for the judge, and we'll certainly take that up with the court.

We have never agreed to submit Mr. * on either July 17th or July 21st. And if a mistake was made in your office, then maybe you need to talk with your staff.

And if you consider talking cordially with people from our office calling me a prick in the lobby, which you did about 10 minutes ago, then maybe we need to talk to the court about that too. And we will likewise be filing a Motion for Sanctions.

COUNSEL 1: This is Mr. * again. I didn't call her a prick. I told her the people in her offices acted like pricks. But if she continues to act like this, I might think about calling her one also.

COUNSEL 2: I'll try to take the high road and keep from exchanging any such slurs.

COUNSEL 1: I think the high road's already been abandoned by opposing counsel with her comments before.

You can take my certificate of nonappearance when you're done.¹⁶

Many compare civility and professionalism to ethics. Although civility, professionalism, and ethics tend to overlap, ethics rules and codes set the minimum conduct standards an attorney must exhibit toward courts, clients, counsel, and third parties.¹⁷

There are no minimum standards of conduct for civility and professionalism. Lawyers who engage in incivility or unprofes-

¹⁶ True example from a deposition that took place in Dallas, Texas; identity of the parties and counsel are not disclosed, for obvious reasons.

¹⁷ See ABA MODEL RULES OF PROFESSIONAL CONDUCT (1995); ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969); *see also* ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT (1995) [hereinafter ABA LAWYER'S MANUAL].

sionalism know in general they will not be held accountable for such actions.¹⁸ Attorneys who violate state or bar association ethical rules and codes, on the other hand, can be subject to court imposed sentences and sanctions, in addition to bar association inquiries.¹⁹

Many states adopted the ABA Model Rules and Model Code as ethical standards, guidelines, and minimums that lawyers must abide by when practicing in state courts.²⁰ Lawyers who focus on winning at all costs, engaging in "scorched earth" practices, might not break ethical guidelines or rules, but those lawyers break many unspoken and unwritten rules on civility and professionalism upon which our profession was built. Why are we concerned about uncivil and unprofessional conduct if ethical rules are not broken? The reason we should be concerned is that civility and professionalism provide the building blocks not only for our ethical structure but for our system. Civility makes our adversarial system tick. Civility, not ethics, keeps our system plugging along, so that disagreements can be ironed out, preventing unnecessary delays and high costs, which eventually bring the system to a screeching halt.²¹ These high costs are borne by both plaintiffs and defendants with both parties losing in the end.

Edmund Burke's commentary regarding civility as it relates to ethical standards noted that "[t]he law touches us but here and there, and now and then. Manners are what vex or soothe, corrupt or purify, exalt or debase, barbarize or refine us, by a constant, steady, uniform, insensible operation, like that of the air we breathe in."²²

Why are civility and professionalism cornerstones of our adversary system? Because without civility or professionalism, the system stops. For example, imagine a system wherein civility and

¹⁸ See BLUEPRINT, *supra* note 11, at 257.

¹⁹ See *American Airlines, Inc. v. Allied Pilots Ass'n.*, 968 F.2d 523, 528-29 (5th Cir. 1992); see also ABA LAWYER'S MANUAL, *supra* note 17, at 3-7 for a listing of states that have adopted the ABA MODEL RULES OF PROFESSIONAL CONDUCT and a listing of each state's ethical rules.

²⁰ See Scott R. Bickford & Paula Hamilton Lee, *Restricting Lawyers' Solicitation of Victims*, 25, THE BRIEF 8, 24 (Fall 1995); ABA LAWYERS' MANUAL, *supra* note 17, at 3-7.

²¹ See Thomas Gibbs Gee & Bryan A. Garner, *The Uncivil Lawyer: A Scourge at the Bar* 15 REV. LITIG. 177, 188-89 (1996) [hereinafter Gee & Garner].

²² *Id.* at 189 (quoting George Weigel, *The Member From Bristol*, 95 COMMENTARY 54, 56 (1993) (reviewing CONOR C. O'BRIEN, *THE GREAT MELODY: A THEMATIC BIOGRAPHY OF EDMUND BURKE* (1992))).

professionalism were absent. What if none of your phone calls were returned, if simple requests for production were answered with vague, broad, and irrelevant objections, if extensions for time were never given, if stipulations were never entered into even when facts were uncontested, if keeping appointments was not adhered to, especially when it proved a tactical advantage to show up late for a hearing so that your opponent had to wait all day through docket call, if motions to compel were necessary to get a response to each and every request for admissions, interrogatories, and requests for production, and if depositions were filled more with attorneys arguing, obstructing testimony, and coaching witnesses, than witness testimony? This uncivil unprofessional behavior brings a screeching halt to our aviation practice as we know it. Instead of trying to resolve our clients' claims, we spend most of our time on the phone arguing about non-issues or in front of a judge or magistrate arguing about behavior that was not tolerated in our kindergarten classes.

This is why civility and professionalism are so important and why they are the cornerstones to not only our ethical rules, which mandate minimum lawyerly conduct, but also are the very foundation of our adversarial and legal system. Ethics and civility overlap, and ethical lawyers are usually civil lawyers, treating witnesses, counsel (which includes counsel's secretary and paralegal), and the court with respect.²³ Respect usually is not given but earned through the treatment of others.

Many state commissions on professionalism realize that, although attorneys are within the ethical rules and guidelines of practice, the absence of civility and professionalism in the practice is a rising concern, as it is disruptive to the practice.²⁴ Many states are forming committees on civility to address this growing trend.²⁵ Courts have also addressed civility and professionalism exhibited in the courtroom, sending strong messages to practitioners within the court's jurisdiction that uncivil and unprofes-

²³ See Gary L. Stuart, *How Can You Lose With Truth?*, 22 No. 3, LITIG., 14, 16 (Spring 1996); see also *Shapero v. Kentucky Bar Assoc.*, 486 U.S. 466, 488-89 (1988) (O'Connor, J. dissenting) ("One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market.").

²⁴ See *Gee & Garner*, *supra* note 21, at 190-91; FINAL REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT, 143 F.R.D. 441 (1992) [hereinafter 7TH CIRCUIT CIVILITY REPORT].

²⁵ See 7TH CIRCUIT CIVILITY REPORT, 143 F.R.D. at 441.

sional conduct will not be tolerated unless you are willing to bear the heat for such conduct.²⁶

For the uncivil and unprofessional practitioner, the winds are changing as courts, in addition to counsel, are becoming less tolerant of such conduct. Attorneys who know uncivil conduct when they see it are willing to spend time, effort, and possibly money trying to stop such behavior as it brings down not only our profession, but it impedes our representation of our clients' rights.

II. HOW DID WE GET WHERE WE ARE TODAY? — THE PROBLEM DEFINED

What we lawyers want to do is substitute courts for carnage, dockets for rockets, briefs for bombs, warrants for warheads, mandates for missiles.

— George Rhine

Why do we have uncivil and unprofessional behavior, wherein lawyers strive to gain a reputation for winning at all costs and playing hardball?²⁷ Hardball lawyers are those who insist on all procedural rules being followed to a tee, consider litigation or transactional confrontations warfare, describe their practice in military terms, and refuse to extend basic courtesies to opposing counsel under the guise that this extension would somehow impede their clients' interests.²⁸ You know you have run into a hardballer when you are spending more time responding to a plethora of irrelevant technical procedural motions and answering irrelevant discovery, rather than focusing on the relevant issues at hand and moving the case forward. A hardball practitioner never grants an extension or agrees to stipulate to anything unless there is a tactical advantage. The hardball practitioner will also always keep score of any courtesy grudgingly extended to you.²⁹ This hardball practitioner will readily use the excuse that it is the client and not the practitioner who refuses to grant the extension or stipulation or cannot work with your schedule.

²⁶ See, e.g., *Dondi Properties Corp. v. Commerce Sav. & Loan Assoc.*, 121 F.R.D. 284 (N.D. Tex. 1988), see *infra* notes 43-49 for a discussion of this case.

²⁷ See Bradley W. Foster, *Playing Hardball In Federal Court: Judicial Attempts To Referee Unsportsmanlike Conduct*, 55 J. AIR L. & COM. 223, 223-24 (1989).

²⁸ See generally *id.*

²⁹ See Marvin L. Karp, *Some Reflections on Change - And Professionalism*, 24, THE BRIEF 9, 10-11 (Summer 1995).

Why would someone try to gain such a reputation? Some think a reputation as a hardball lawyer is a good marketing tool to get clients' cases. Plaintiff and defense attorneys have been heard to boast in marketing opportunities that they win at all costs, take no prisoners, and bend the rules at whatever cost it takes to further a client's case. Clients also promote the "win at any cost" syndrome due to the readily available market of too many attorneys compared with available clients as consumers.³⁰ Some clients come to expect uncivil behavior as a comfort gauge to ensure that their rights and interests are being furthered, and they have the mentality that niceties, civilities, and courtesies hamper the advancement of their case and give the impression that they are an easy target or pushover.

Attorneys have also been known to tell their clients that "Rambo-like" behavior is the norm and that the "scorched earth" practices of not agreeing to extensions, filing motions based on trivial procedural grounds, and continuing to litigate cases in order to squeeze each and every last billable hour from the case are all necessary to fully and adequately protect the client's interests and reputation.³¹ In reality, sometimes this type of behavior is a smoke screen to further the attorney's own agenda. This secret agenda might be attributed to the growing number of attorneys who outnumber available business and representation opportunities.³²

Another rationale for uncivil and unprofessional behavior in the aviation field relates to the mobility of our practice. Some lawyers suffer from "I'll never try a case here again"-itis, throwing civility to the wayside based on the fact that the lawyer does not intend nor expect to try to deal with court or counsel in that jurisdiction again.³³ Some blame the lack of civility on law schools, in that ethics courses focus too much on rules and codes that provide the boundaries of minimal ethical conduct, as opposed to teaching good old-fashioned courtesy, etiquette, and civility in day-to-day practice.³⁴ Law schools tend to promote the "win at all costs" motto, fostering competition in order

³⁰ See Gee & Garner, *supra* note 21, at 185.

³¹ See *id.* at 193.

³² See *id.* at 181 (The American bar trebled its membership numbers between 1970 and 1990 from 275,000 to nearly 800,000 attorneys).

³³ See generally *id.*

³⁴ See *id.* at 185; Gus A. Schill, Jr., *Old Wine Into New Bottles and Old Wine Into New Bottles Revisited*, 18 Hous. J. INT'L L. 817, 818 (1996); BLUEPRINT, *supra* note 11, at 263, 266-71.

to obtain high grades that are necessary to secure the limited number of jobs available upon graduation.³⁵ Conduct such as hiding source books when first year legal writing briefs are due, sabotaging study groups, and securing secret outlines are some examples of condoned law school conduct praised by some administrators as creative skills that will aid law students in the real life practice of law.

Failure to exhibit civility in our practice might also be attributed to practitioners who dabble in the aviation field, not realizing that our practice field is a small one and that the extension of courtesy and civility to co-counsel and opposing counsel are considered valued conduct in our profession. Lawyers who enter the aviation field merely to "make a fast buck" are usually unfamiliar not only with the law and legal concepts necessary to adequately and competently litigate a case, but also with common courtesy and civility in which those in our industry try to extend to each other.³⁶

Some say that modern technology encourages uncivil practice in our field because face-to-face meetings are less frequent, and much business is done via fax machines, over telephone wires, and through computer modems.³⁷ It is much easier to be uncivil to a voice in a box or to a computer screen than to be unprofessional to someone's face.

Another twist of modern technology that has led many states to re-evaluate rules and regulations regarding direct communication by lawyers to prospective clients following an airline disaster is the Internet.³⁸ Although Internet solicitations usually fall under the state solicitation and lawyer advertisement rules and statutes and deal more with minimum ethical conduct as opposed to professionalism in our practice, direct Internet solicitation, especially on the heels of an air disaster, is a very strong comment on our profession. This modern technology has allowed many attorneys to directly contact grieving survivors on the day of a mass disaster airline crash.³⁹ Many states are quickly

³⁵ But see Donald J. Hall, *Teaching: Thoughts and Concerns*, VAND. LAW., Vol. 28, No. 1998, at 15.

³⁶ See John Gibeaut, *The Other Victims, Speaker Say Loved Ones Need Better Response, More Information from Legal System in Air Crashes*, October 1997 A.B.A. J., 104 [hereinafter *The Other Victim*].

³⁷ See Gee & Garner, *supra* note 21, at 183.

³⁸ See Thomas H. Watkins & Lisa O. Laky, *Internet Issues for Lawyers*, 507 PRAC. L. INST., 827, 839-842 (1998).

³⁹ See *id.* at 842.

addressing the Internet as it relates to attorneys' solicitation and advertisement. The Internet also requires the aviation industry to evaluate what image we want to project following an aviation disaster. This image directly relates to how, when, where, and by whom contacts are made to survivors or family members of an air disaster.⁴⁰ Air disasters such as the Value-Jet, TWA, and Swiss Air crashes tend to breed a frenzy among not only plaintiffs' attorneys seeking to gain cases, but also defense attorneys seeking to settle claims in a timely and inexpensive manner. This frenzy sometimes spells unprofessional or uncivil conduct, mainly between the lawyers, the legal profession, and the victims or their survivors.⁴¹

Yet others believe that incivility, being more of a recent trend, is due to new lawyers entering the practice who do not have mentors to teach them why civility and professionalism are essential to our practice.⁴² Young attorneys, dealing with co-counsel and opposing counsel, are continually exposed to uncivil and unprofessional conduct and believe this conduct is the norm and is necessary to zealously advocate and further a client's interests. The more seasoned practitioners in our field often exploit a young associate's naiveté by pushing the hardball tactics to an unprofessional extreme in order to gain tactical advantages. Whether uncivil conduct in our practice can be tied to a specific origin or not, it does exist.

III. CIVILITY AND PROFESSIONALISM IN OUR PRACTICE — AN UNTENABLE GOAL?

Art, like morality, consists in drawing the line somewhere.

— G. K. Chesterton

Most uncivil conduct occurs in the discovery process, as this process is not directly in front of the court. This is not to say that all aviation practice is characterized by uncivil and unprofessional conduct. Many practitioners in our field believe that civility and professionalism should be extended to everyone, from secretaries at opposing counsel's office to third parties.

⁴⁰ See *infra* note 54 for a discussion of the 1996 Aviation Disaster Family Assistance Act.

⁴¹ See generally *The Other Victims*, *supra* note 36, at 104; Jennifer Mears, *Lawyer Faces Lawsuit Over Post-Crash Acts*, COLUMBIAN, Feb. 13, 1998, at 1998 WL 7180570 (discussing NTSB pursuit of law firm that solicited case within thirty days of plane crash).

⁴² See Gee & Garner, *supra*, note 21, at 187.

Those in our practice who do not share this view are the ones who give lawyers a bad name, make the aviation practice an expensive one, and slow our system down considerably.

Some courts are not waiting for local bar associations or appellate courts to provide standards as to an attorney's uncivil behavior. For example, the Northern District of Texas established in *Dondi Properties Corp. vs. Commerce Savings & Loan Assoc.*,⁴³ the standards of litigation conduct to be observed in the Northern District. The *Dondi* case, an en banc decision, pertained to the consolidation of two cases (*Dondi* and *Knight*) filed in the Northern District of Texas. In *Dondi*, sanction motions and motions to compel were filed against the plaintiff for failure to answer interrogatories, failure to comply with prior orders of the court pertaining to discovery, withholding of documents, and misrepresenting facts to the court.⁴⁴ The *Knight* case pertained to the plaintiff's motion to strike a reply brief that defendant filed without leave of the court.⁴⁵ The *Dondi* en banc court set the tone for its admonitory opinion by suggesting that abusive litigation tactics ranging from "benign incivility" to outright obstruction, while of a relatively recent origin, have become so prevalent that they impede the effective administration of the court system and place litigation outside the financial reach of many litigants.⁴⁶

With alarming frequency, we find that valuable judicial and attorney time is consumed in resolving unnecessary contention and sharp practices between lawyers. Judges and magistrates of this court are required to devote substantial attention to refereeing abusive litigation tactics that range from benign incivility to outright obstruction. Our system of justice can ill-afford to devote scarce resources to supervising matters that do not advance the resolution of the merits of a case; nor can justice long remain available to deserving litigants if the costs of litigation are fueled unnecessarily to the point of being prohibitive.⁴⁷

The *Dondi* court concluded that trial courts are in the best position to evaluate acceptable trial practice conduct by counsel practicing before the court. The *Dondi* court accordingly adopted eleven standards of practice to be observed by attorneys appearing in the Northern District of Texas courts:

⁴³ 121 F.R.D. 284 (N.D. Tex. 1988).

⁴⁴ See *id.* at 285.

⁴⁵ See *id.*

⁴⁶ See *id.* at 286.

⁴⁷ *Id.*

(A) In fulfilling his or her primary duty to the client, a lawyer must be ever conscious of the broader duty to the judicial system that serves both attorney and client.

(B) A lawyer owes, to the judiciary, candor, diligence and utmost respect.

(C) A lawyer owes, to opposing counsel, a duty of courtesy and cooperation, the observance of which is necessary for the efficient administration of our system of justice and the respect of the public it serves.

(D) A lawyer unquestionably owes, to the administration of justice, the fundamental duties of personal dignity and professional integrity.

(E) Lawyers should treat each other, the opposing party, the court, and members of the court staff with courtesy and civility and conduct themselves in a professional manner at all times.

(F) A client has no right to demand that counsel abuse the opposite party or indulge in offensive conduct. A lawyer shall always treat adverse witnesses and suitors with fairness and due consideration.

(G) In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer's conduct, attitude, or demeanor towards opposing lawyers.

(H) A lawyer should not use any form of discovery, or the scheduling of discovery, as a means of harassing opposing counsel or counsel's client.

(I) Lawyers will be punctual in communications with others and in honoring scheduled appearances, and will recognize that neglect and tardiness are demeaning to the lawyer and to the judicial system.

(J) If a fellow member of the Bar makes a just request for cooperation, or seeks scheduling accommodation, a lawyer will not arbitrarily or unreasonably withhold consent.

(K) Effective advocacy does not require antagonistic or obnoxious behavior and members of the Bar will adhere to the higher standard of conduct which judges, lawyers, clients, and the public may rightfully expect.⁴⁸

The *Dondi* court went on to warn attorneys who were not swayed by the *Dondi* standards of practice that, if they persist in their win-at-all-costs tactics, they can expect the court to sanction their conduct accordingly.⁴⁹ Some state courts in Texas have

⁴⁸ *Id.* at 287-88.

⁴⁹ *See id.* at 288 (sanction examples ranged from a court reprimand to compulsory legal education, monetary sanctions or other measures appropriate as deemed by the court.); *see also* Foster, *supra* note 27, at 232-54 for a discussion of

gone another route in dealing with attorneys exhibiting unprofessional conduct before their bench. For example, Texas appellate courts and the Texas Supreme Court have threatened attorneys who "bad-mouth" or criticize judges in motions and briefs with monetary sanctions and state bar grievance investigations.⁵⁰ Texas courts view these actions as disrespectful and constituting possible violations of the Texas professional rules of conduct.⁵¹

Aviation attorneys have recently banded together to form a national committee to set some self-regulating guidelines regarding the solicitation of cases after air disasters.⁵² Aviation practitioners, consisting of both plaintiff and defense attorneys, are working together on issues such as solicitation following air disasters, as this is a highly publicized topic that has attracted much negative publicity to both the plaintiff and defense bar.⁵³ Although uncivil and unprofessional conduct is not as highly visible a topic as solicitation of cases after an air disaster, it is a matter that deserves attention from the aviation field as a whole.

Due in part to plaintiff and defense aviation attorneys banding together on issues of solicitation, which in the end affects the way the public views our profession and its professionalism, the Aviation Disaster Family Assistance Act was signed into law on October 9, 1996, and is codified at 49 U.S.C. § 1136 (1996). The Assistance Act provides that:

no unsolicited communications concerning a potential action for personal injury or wrongful death may be made by an attorney or any potential party to the litigation to an individual injured in the accident, or to a relative of an individual involved in the acci-

constitutional and procedural considerations for enforcing sanctions against uncivil and unprofessional conduct in court.

⁵⁰ See Susan Borreson, *Lawyers Who Bad-Mouth Judges May answer to State Bar*, TEXAS LAWYER, November 24, 1997, at 4-5.

⁵¹ See *id.*

⁵² See Robert A. Clifford, *When A Plane Goes Down*, WASH. POST, December 9, 1997, at A25; see also Tom Kuntz, *From Bitter Experience, New Ways to Handle Aviation Calamities*, N.Y. TIMES, November 23, 1997 at D7.

⁵³ See Linda S. Althoff, *Solicitation After An Air Disaster: The Status of Professional Rules and Constitutional Limits*, 54 J. AIR L. & COM. 501, 501-03 (1998) (citing examples of questionable plaintiff practices to sign up cases); Ron Nissimov, *Stage Set For O'Quinn Disbarment Trial*, HOUS. CHRON., Oct. 6, 1998, at 19A (Texas attorney John O'Quinn faces a December 1998 disbarment jury trial for charges of barratry stemming from allegedly unethically hiring non-attorneys to solicit cases after a 1994 North Carolina plane crash).

dent, before the thirtieth (30th) day following the date of the accident.⁵⁴

The National Transportation Safety Board (NTSB) is the designated governmental entity assigned to insure that attorney solicitation is outside the thirty day prescribed window.⁵⁵

Many states are taking notice of The Assistance Act and are passing bills that prohibit attorneys from soliciting accident victims and their families for thirty days after the death or injury of a loved one.⁵⁶

Local bar associations have also taken measures to curb uncivil conduct amongst their members. For example, the Dallas Bar Association promulgated *Guidelines Of Professional Courtesy* and a *Lawyer's Creed*, which the Northern District of Texas adopted in its *Dondi Properties Corp.* decision.⁵⁷ The Dallas Bar Association's *Guidelines of Professional Courtesy* and *Lawyer's Creed* set forth conduct to which lawyers practicing in the Dallas state court system must adhere. Dallas practitioners must exhibit courtesy, civility, and professionalism to the court, co-counsel, and the public at all times. The *Guidelines of Professional Courtesy* outline conduct to be followed in depositions, hearings, and discovery matters, where much abuse frequently takes place.⁵⁸

Lawyers practicing in Dallas are persuaded not to engage in abusive discovery practices, to coordinate with opposing counsel for the scheduling of hearings and depositions, to resolve conflicts amicably, to provide opposing counsel with reasonable requests and reasonable notice for hearings and depositions, and to provide counsel with as much notice as possible when conflicts arise or extensions when deadlines cannot be met.⁵⁹ The Dallas Bar Association's *Lawyer's Creed* focuses on preserving the dignity of its practice, treating fellow bar members with a "fundamental sense of integrity and fair play," and providing fellow members accommodations and cooperation in the practice of law.⁶⁰

⁵⁴ 49 U.S.C. § 1136(g)(2).

⁵⁵ See generally *id.*; see also *NTSB Sues Lawyer For Soliciting Accident Victims' Families*, AVIATION DAILY, Feb. 13, 1998, available in, 1998 WL 9030859.

⁵⁶ See Melisa George, *Let Sleeping Plaintiffs Lie: Restricting Attorneys' Rights to Make Direct-Mail Solicitation*, 22 J. LEGAL PROF., 251, 257-259 (1998).

⁵⁷ 121 F.R.D. at 287.

⁵⁸ See *id.* at 293-94.

⁵⁹ See *id.* at 293-95.

⁶⁰ See *id.* at 294-95.

A true life example of unprofessional conduct, which the *Dondi* Court and the Dallas Bar addressed, is taken from the start of a deposition taken in Dallas:

Q: Please state your name.

OPPOSING COUNSEL: Objection. Assumes facts not in evidence.⁶¹

Tactics like this made it important for the Dallas Bar Association to address uncivil practice and the lack of professionalism within its association. The Dallas Bar Association's need for a *Lawyer's Creed and Guidelines of Professional Courtesy* exemplifies the fact that we do have a problem in some areas of practice as to civility and professionalism amongst bar members.

IV. WHERE DO WE GO FROM HERE? NAVIGATING TOWARDS THE CIVIL AND PROFESSIONAL BEACONS

Aside from local bar organizations and practice groups trying to change their image as to professionalism, how else can we improve civility and professionalism amongst ourselves? Change always starts from within. I have had the honor of litigating with and against some of the finest aviation attorneys in the United States. These practitioners exhibit integrity, professionalism, and civility not only to co-counsel, but to opposing counsel. These members of our practice are mentors and practitioners that we look up to and aspire to be like. These practitioners obtain the best results for their clients and usually save their clients not only costs, but time in the litigation or resolution of their dispute. These practitioners realize that the lawyer, not the client, determines accommodations to be granted to opposing counsel in all matters not directly affecting the merits of the case or causing prejudice to their client's rights. You will not hear these practitioners failing to grant a simple stipulation or extension of time because the client would not allow them to do so.

These practitioners believe that their standard of conduct and the extension of civility and professionalism to clients, counsel, and the court is more important than the need for money, power, or personal gain. As a consequence, these practitioners have earned the respect of courts, counsel, and clients, and civility and professionalism have become their mode of practice. As stated by the Florida Commission On Lawyer Professionalism,

⁶¹ True example from a deposition that took place in Dallas, Texas; attorney names purposely not disclosed.

"[p]rofessionalism ultimately is an individual decision and a way of life for every lawyer."⁶²

Engaging in civility and professionalism might, for some, mean that billable hours will not be as profitable as before and that your "come to Jesus" talk to your client takes place at the beginning of your client's representation, not when you are trying to settle the case. In the end, your client is the real winner, realizing less in attorney's fees and a faster resolution to the dispute.

This is not to say that when being fired upon with incivility and unprofessionalism that you should roll over and play dead. Sometimes courts need to get involved because of such behavior, and other times you need to fight back to protect your client's interests. One thing is for sure, clients appreciate truthfulness as to the true law and the true facts. A realistic view of the outcome is more likely to encourage a quicker resolution of the dispute at hand and foster cooperation not only between you and your client, but between you and your opposition.

Fostering uncivil and unprofessional conduct in our practice comes at a price. The price usually translates to financial and emotional costs that create hardships and animosity between client and counsel, and between counsel and opposing counsel, wherein the settlement or resolution of the dispute becomes unlikely. Lawyers exhibiting such behavior become part of the problem, not part of the resolution.

Will a paper like this convert those uncivil and unprofessional practitioners? Probably not. Hopefully, this paper will provoke some of us to think more of fostering civil and professional conduct within our own offices, within our own case load, and within our bar association. New and old lawyers should meet and discuss litigation and case alternatives so as to promote client interests, decreased fees, and the resolution of claims in a timely fashion. Gaining a reputation for being a problem solver and for obtaining good results for clients in a civil and professional way is a reputation that many of us strive for. Exhibiting civil and professional behavior to members of the aviation bar not only promotes the goals of our clients, but promotes the aviation practice as a whole.

⁶² Atkinson, *supra* note 14, at 269 (quoting COMMISSION ON LAWYER PROFESSIONALISM, FLORIDA BAR, PROFESSIONALISM: A RECOMMITMENT OF THE BENCH, THE BAR, AND THE LAW SCHOOLS OF FLORIDA (1989) at 33).

Comments

